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NO. 88-488
IN THE SUPREME COURT OF THE UNITED STATES

BARRY L. RIDER, KENNETH L. CHARLES, ALAN L. FOUST, STEPHEN ELLIS, STEPHEN F. KEEN, RONALD E. LARISON, JOSEPH P. MARKLEY, DONALD R. MILLER, JR., BLAINE L. SINGER, CLARE SMITH, Executrix of the Estate of Leonard Smith, LaRUE D. SMITH, DANIEL H. THOMAS, BLAINE A. TRUTT, JOHN THOMAS WILLIAMS, and JON F. VETTER, Individually and on behalf of all others similarly situated,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA; GLENN R. JEFFES, Commissioner of PA Bureau of Corrections; PENNSYLVANIA BUREAU OF CORRECTIONS; ANN M. GOOLSBY, Superintendent of Muncy Correctional Institution; J. L. ANDREWS, Personnel Officer of Muncy Correctional Institution; JOHN E. MILLETT, Executive Director PA Civil Service Commission; PENNSYLVANIA CIVIL SERVICE COMMISSION,

Respondents

REPLY BRIEF OF PETITIONERS ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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ARGUMENT

To assert, as do Respondents, that the present case has no broad significance is to ignore reality. The present case involves interpretation of the Collective Bargaining Agreement and the contract provisions contained therein within the framework of common law arbitration. Common law arbitration exists throughout the United States. *Loc. Div. 732 vs. Metro. Alt. Rapid Trans. Auth.*, 251 Ga. 15, 303 S.E.2d 1 (1983); *Jefferson County vs. Barton-Douglas Contr.*, 282 N.W.2d 155 (Iowa 1979); *Whitaker vs. Seth E. Giem & Associates*, 85 Mich. App. 511, 271 N.W.2d 296 (1978); *Heffner vs. Jacobson*, 100 N.J. 550, 498 A.2d 766 (1985); *Daniels Ins. Agency, Inc. vs. Jordan*, 99 N.M. 297, 657 P.2d 624 (1982); *Warner vs. CTL Engineering, Inc.*, 9 Ohio App.3d 52, 458

N.E.2d 399 (1983); Olshan Demolishing vs. Angleton Ind. School D., 684 S.W.2d 179 (Tex.App. 14 Dist. 1984); Stradinger vs. City of Whitewater, 89 Wis.2d 19, 277 N.W.2d 827 (1979). While the procedures used for such arbitration are dependent upon the bargain between the parties, the process is generally the same and state court review does not permit review of errors of law and fact. Warner vs. C.T.L. Engineering, Inc., supra.

In the context of arbitration under a collective bargaining agreement, regardless of whether the decision on the claim is being made by an arbitrator or a state court, a decision "is legitimate only so long as it draws its essence from the collective bargaining agreement." United Steelworkers of America vs. Enterprise Wheel & Car Corp., 363 U.S. 593 at 597

(1960). Neither the arbitrator nor the State Court under its limited powers of review have authority to invoke public laws that conflict with the bargain between the parties as set forth in the contractual provisions. Alexander vs. Gardner-Denver Co., 415 U.S. 36, 53-55 (1974). As anyone who is familiar with collective bargaining agreements knows, such agreements generally contain a provision which permits the employer broad and ill-defined latitude in making decisions which he considers beneficial to the running of his business.

In the present case, the collective bargaining agreement contains exactly such a provision which permits the employer freedom and free rein to assign jobs where the employer feels it is necessary in order to protect the efficiency of operation. Com. Dept. of Corrections vs. Am.

Federation, 101 Pa.Cmwlth. 121, 515 A.2d 1000, 1002 (1986). To permit such broad contractual language to preclude a plaintiff's federal or even state law discrimination claims is to deny the plaintiff a decision on the merits of his claim. There is simply no case which holds that an employer can assign jobs based upon sex if the employer simply feels it is necessary in order to protect the efficiency of operation. To permit federal and state discrimination law and decisions directly interpreting this law to be replaced by contractual provisions is of broad significance to all those involved in collective bargaining agreements. To state that a decision based upon such a contractual standard amounts to a decision upon the merits is to incorporate into all

collective bargaining agreements a scope which has heretofore not existed.

In the instant case, the federal Complaint did not challenge the general authority to classify jobs by sex, but alleged improper certification, failure to attempt to reasonably accommodate, and retaliation against the Petitioners through purposeful and knowing improper certification. By virtue of the above set forth contract provisions, all of these individual claims have been swept aside without any factual or legal determination of the merits of these claims under federal law.

Petitioners submit that the Respondents are well aware of the difference between the contractual standard and the statutory standard upon which a decision on the merits should be reached.

The Respondents repeatedly attempt to characterize this case as one involving a determination of an "operational necessity." (Respondents' Brief, p. 2, p. 10). While a specific determination of "operational necessity" may more closely approach the requirements of federal law, Petitioners defy Respondents to point to any such determination and, in fact, such words are never used in the Commonwealth Court's Opinion.

Contrary to the Respondents' assertions, the present case does not focus upon review of a lower court's determination with regard to state law. In their Petition for Certiorari, Petitioners set forth the procedures involved in common law arbitration, a process concerned solely with contract interpretation, to demonstrate that such procedures do not and

cannot afford a decision upon the merits of a federal or even state discrimination claim. These procedures were set forth to demonstrate the difference between the lengthy analysis engaged in in Kramer vs. Chemical Const. Corp., 456 U.S. 461 (1982), and the present case. The process involved in Kramer and the general contractual interpretation involved in the present case demonstrate that there are different considerations involved in the present case and Kramer which warrant review by this Court.

Finally, Petitioners do not want this Court to be misled into believing that the state court decision involved any review of or findings of fact with regard to the claims contained in Petitioners' federal Complaint. Petitioners would simply point out that a reading of the Commonwealth

Court decision, which was concerned only with the "essence of the contract," graphically demonstrates that the Court did not intend nor could it have reached the specific claims set forth in the Petitioners' federal Complaint. To apply 28 U.S.C. § 1738 in the present case has the direct effect of denying any fair opportunity to have the individual claims decided upon their merits, a result which is not compelled by this Court's decision in Kramer.

Respectfully submitted,

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Respondents

CERTIFICATE OF SERVICE

I, CLIFFORD A. RIEDERS, a member of the Bar of the Court, hereby certify that on this 2nd day of December, 1988, two (2) copies of the Reply Brief of Petitioners in the above entitled case were mailed, first class, postage prepaid,

to Amy Zapp, Esquire, Office of Attorney General, 15th Floor, Strawberry Square, Harrisburg, PA 17120, counsel for all Respondents herein.

I further certify that all parties required to be served have been served.

RIEDERS, TRAVIS, MUSSINA, HUMPHREY & HARRIS

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